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Subject New comment on REG 2011-01 submitted by Berg, R. Christian

Please find attached the contents for the new comment submitted on Mon Aug 22 14:55:34 EDT 2011.
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Attached please find the comments of Citizens United regarding the petition for rulemaking filed by Representative Chris Van Hollen.

Comments provided by :
Berg, R. Christian

August 22, 2011

Mr. Robert M. Knop
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: COMMENTS OF CITIZENS UNITED REGARDING THE PETITION FOR RULEMAKING FILED BY REPRESENTATIVE CHRIS VAN HOLLEN

Dear Mr. Knop:

We appreciate the opportunity to comment on Representative Chris Van Hollen's petition for rulemaking that aims to chill political speech through burdensome regulation.

Citizens United is a Section 501(c)(4) membership organization dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, sovereignty, and national security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.

Citizens United is widely known for having produced popular and timely documentaries including *Generation Zero*, *Ronald Reagan: Rendezvous with Destiny, Perfect Valor* and *Fire From the Heartland*.

Citizens United, and its film *Hillary the Movie* were at the heart of the Supreme Court decision in *Citizens United v. FEC*, 130 S.Ct. 876 (2010). In restoring the free speech rights of corporate speakers the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in its entirety, as well as that portion of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) that upheld the ban on corporate-sponsored electioneering communications. This decision has allowed many, previously silent, speakers to exercise their right to free speech.

Representative Van Hollen has filed a petition for rulemaking to revise and amend regulations relating to the disclosure of independent expenditures.[1] The independent expenditure regulations Representative Van Hollen seeks to revise were promulgated in 2003.[2] These regulations enabled the disclosure regime enacted by Congress.

Absent evidence of a real need for revision, Representative Van Hollen attempts to justify his petition by referencing the Supreme Court's decision in *Citizens United*; his petition distorts both the decision and its subsequent impact. The *Citizens United* decision cannot properly be cited as justifying this attempt to overturn the judgment and findings of the Commission.

Representative Van Hollen's regulatory proposal and alleged need for regulatory revisions are flawed and must be rejected in their entirety. Our comments will address two areas: (1) the disclosure scheme endorsed by the Supreme Court in *Citizens United*; and (2) the impact on the exercise of First Amendment rights should Representative Van Hollen's regulatory proposal be promulgated.

THE DISCLOSURE SCHEME ENDORSED BY THE SUPREME COURT IN *CITIZENS UNITED*

Representative Van Hollen's petition for rulemaking cites *Citizens United* as creating a need for revising the independent expenditure reporting requirements. Were Representative Van Hollen asserting that regulations rendered unenforceable by *Citizens United* should be stricken from the books, he would be correct. That however is not Representative Van Hollen's goal. He cites *Citizens United* in an attempt to broaden reporting requirements, in an unduly burdensome fashion. Such an expansion would be at odds with the plain language of the *Citizens United* decision.

[1] Representative Van Hollen appears to view the filing of this petition for rulemaking as little more than a procedural hurdle on his way to the courthouse. Democracy 21, a so called "non-partisan" organization representing Mr. Van Hollen in his current litigation over "electioneering communications" states that: "Representative Van Hollen filed a FEC rulemaking petition on the 'independent expenditures' regulation instead of a lawsuit because the statute of limitations requires the FEC to be given an opportunity to change the 'independent expenditure' regulation prior to the filing of a lawsuit challenging it. The same is not true of the regulation on "electioneering communications" which was promulgated more recently and can be directly challenged in court." *Democracy 21 Press Release, April 21, 2011.*

[2] The FEC also applies an intent based standard to disclosure of contributors to corporations and labor organizations that make electioneering communications pursuant to 11 CFR 114.15. While independent expenditures and electioneering communications are factually distinguishable, similar concerns apply to both systems. The burdensome expansion of reporting requirements for either would have a chilling effect on speech. Throughout these comments, where additional evidence can be provided based on experiences with electioneering communications reporting, it has been provided.

The Court made clear that campaign finance laws and regulations should not be so overly burdensome as to chill speech.

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."

Thus, the goal of any regulation in this field should be to avoid chilling speech. The Court endorsed the application of the FEC's current disclosure requirements to corporate independent expenditures and electioneering communications. To expand these reporting requirements as proposed by Representative Van Hollen would enter into a regulatory realm far greater than that applied by the Court.

Representative Van Hollen's proposed regulatory scheme is more akin to the registration and reporting obligations imposed on federal political action committees. The Court found that PAC reporting requirements would effectively silence potential speakers.

> So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.
>
> And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur: "These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliate committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made;

> the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation."
>
> PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs.

The Supreme Court is not the only court to have recently addressed the chilling impact of burdensome regulation of political speech. More recently the United States District Court for the Southern District of West Virginia has ruled on the validity of a disclosure scheme that closely parallels Representative Van Hollen's regulatory proposal.[3]

The West Virginia code required disclosure of the "names and addresses of any contributors who contributed a total of more than one thousand dollars between the first day of the preceding calendar year and the disclosure date and whose contributions were used to pay for electioneering communications."[4] Ambiguity existed as to whether an organization must disclose those contributors who earmarked funds for an electioneering communication, or an expansive reporting burden that would have required disclosure of all contributors to the general treasury funds who met the threshold.

West Virginia sought to require disclosure of "the names and addresses of all contributors to an organization's general treasury who meet spending threshold ($1,000)." The District Court rejected this broad disclosure standard. The District Court, applying a standard of "exacting scrutiny" found that:

> "the statute, interpreted as West Virginia suggests, bears no substantial relation to the government interest it serves. Not only may a large swath of general treasury contributors not support an organization's electioneering communications, they may not even be aware that the organization is engaging in electioneering communications. In addition, several witnesses in the relevant FEC hearing indicated that even identifying all individuals who provided $1,000 in funds to a corporation or labor organization 'would be very costly and require an inordinate amount of effort.' Administrative costs aside, the consequence of the disclosures required by W. Va. Code Sec. 3-9-2b(b)(5), which encompass the names and addresses of general donors, corporate investors, and even customers who have purchased the company's products or services, will surely

[3] *Center for individual Freedom, Inc. v. Natalie Tennant*. Case 1:08-cv-00190 (S.D.W.Va. 2011).

[4] The West Virginia statute defined "electioneering communication" as "any paid communication made by broadcast, cable or satellite signal, or published in any newspaper, magazine or other periodical that: (i) Refers to a clearly identified candidate for Governor, Secretary of State, Attorney General, Treasurer, Auditor, Commissioner of Agriculture, Supreme Court of Appeals or the Legislature; (ii) Is publicly disseminated within: (I) Thirty days before a primary election at which the nomination for office sought by the candidate is to be determined; or (II) Sixty days before a general or special election at which the office sought by the candidate is to be filled; and (iii) Is targeted to the relevant electorate."

> discourage organizations from speaking, or else face diminished business or organizational success.
>
> In summary, W. Va. Code Sec. 3-8-2b(b)(5) does not bear a sufficient relationship to the interest of providing the electorate with meaningful information as to who is speaking in electioneering communications. It adds little value to the disclosure scheme that exists in West Virginia law, and it does so at a great cost to the vitality and ability to speak of corporations and organizations."

Having rejected burdensome disclosure of the sort Representative Van Hollen proposes, the District Court did endorse a disclosure scheme more akin to the one currently found at 11 CFR 109.10.

> "On the other hand, interpreting W. Va. Code Section 3-8-2b(b)(5) to reach only contributions that are either (1) received by the organization or corporation in response to a solicitation specifically requesting funds to pay for an electioneering communication or (2) specifically designated for electioneering communications by the contributor, the statue does not overreach and bears a substantial relation to the information providing purpose it serves."

The District Court found that a sufficiently tailored disclosure requirement would meet the "exacting scrutiny" whereas an overbroad requirement, like Van Hollen proposes, would not.

THE IMPACT ON THE EXERCISE OF FIRST AMENDMENT RIGHTS SHOULD REPRESENTATIVE VAN HOLLEN'S REGULATORY PROPOSAL BE PROMULGATED

The current disclosure system for independent expenditures can be found at 11 CFR 109.10. Representative Van Hollen takes issue with 109.10(e)(vi) which requires verified reports to contain:

> "[t]he identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure."

In order to provide the data most relevant to the general public, the Commission limited disclosure to "contributions [] made for the purpose of furthering the reported independent expenditure."

This disclosure standard is very similar to that imposed on corporations and labor organizations that make electioneering communications pursuant to 11 CFR 114.15. The applicable regulations require:

> "If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications."

Those regulations, promulgated in 2007, were accompanied by an administrative record, replete with examples of the chilling effect of expanded disclosure requirements. While, an independent expenditure can be factually distinguished from an electioneering communication, the chilling impact of expanded disclosure requirements would be similar in either circumstance. For this reason it would be valuable to explore the rationale behind the electioneering communications disclosure scheme promulgated in 2007. When the scheme was before the Commission in 2007 Citizens United submitted comments noting that an expansive disclosure requirement would "likely prove difficult, if not impossible."

Citizens United provided information regarding "the difficulties of compliance would be most acute where revenues are generated through sales, investment capital or a combination thereof, which is generally the case with a commercial business. At the very least, this particular reporting requirement would probably impose such a high burden that it would in practical effect amount to a ban on the ads for some businesses." This was part of the record upon which the Commission made its decision on electioneering communications. The record was replete with examples of the chilling impact that a more expansive reporting burden would impose.

Based on comments received from the regulated community "the Commission [] decided to depart from the rules proposed in the NPRM and instead to require corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs made by that corporation or labor organization pursuant to 11 CFR 114.15."

As noted in the Explanations and Justification ("E&J"): "All commenters who addressed disclosure of ECs stated that corporations and labor organizations should not be required to report the sources of funds that made up their general treasury funds. However, commenters disagreed on what specific EC reporting requirements should apply to corporations and labor organizations."

The E&J noted that this level of disclosure provides the public with ample information:

> "The Commission emphasizes that all the other reporting requirements that apply to any person making ECs, which are set forth at 2 U.S.C. 434(f)(2)(A)–(E) and 11 CFR

104.20(c)(1)–(6), apply also to corporations and labor organizations making ECs permissible under section 114.15. Thus, like all persons making ECs that cost, in aggregate, more than $10,000, corporations and labor organizations must also disclose their identities as the persons making the ECs, the costs of the ECs, the clearly identified candidates appearing in the communications and the elections in which the candidates are participating, and the disclosure dates."

The record before the Commission showed that expanded disclosure requirements would prove impracticable. As noted in the E&J:

> "A corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission. These investors, customers, and donors do not necessarily support the corporation's electioneering communications. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications.
>
> Furthermore, witnesses at the Commission's hearing testified that the effort necessary to identify those persons who provided funds totaling $1,000 or more to a corporation or labor organization would be very costly and require an inordinate amount of effort. Indeed, one witness noted that labor organizations would have to disclose more persons to the Commission under the ECs rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act.
>
> For these reasons, the Commission has determined that the policy underlying the disclosure provisions of BCRA is properly met by requiring corporations and labor organizations to disclose and report only those persons who made donations for the purpose of funding ECs."

With regard to electioneering communications, the Commission found that:

> "requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering ECs appropriately provides the public with information about those persons who actually support the message conveyed by the ECs without imposing on corporations and labor organizations the significant burden of

disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs."

The Commission acknowledged the chilling nature of expanded disclosure provisions on these speakers. To the extent such burdensome disclosure would chill electioneering communications it would also chill independent expenditures.

CONCLUSION

Rather than promulgating more burdensome regulations, the Commission should focus on removing from the books regulations that have been rendered unenforceable by the *Citizens United* decision. In *Citizens United* the Supreme Court found that "[t]he FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975." The complexity of the current state of campaign finance law has only grown since the decision. In 2010 there were 30 advisory opinions requested, and as of the date of these comments 18 have been requested in 2011.

Until the Commission takes action to conform its regulations to the *Citizens United* decision, many antiquated regulations may chill speech for all but the wealthy few that will employ a phalanx of campaign finance attorneys. We have submitted comments in response to the petition for rulemaking filed by the James Madison Center for Free Speech under separate cover which address what changes should be promulgated to conform Commission regulations to the *Citizens United* decision.

Thank you for the opportunity to submit these comments in opposition of Representative Van Hollen's Petition for Rulemaking. Should you have any questions regarding our comments please do not hesitate to contact us.

Sincerely,

Michael Boos
Vice President and General Counsel

R. Christian Berg
Assistant General Counsel